IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

ALLEN PHILIP HAMILTON, Jr., *Appellant,* vs. SECRETARY OF DEFENSE, et al., *Appellees.*	No. 18898

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

REPLY BRIEF.

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POINT I.

Appellees argue that appellant was not entitled to a personal appearance before his local board.

The regulation [§ 1624.1] concerning such appearance recites that the 10 day period may not be extended.

A registrant's rights are not governed solely by the regulations. Fundamental concepts of fairness may properly apply. For example, in *Simmons* v. *United States*, 1955, 75 S. Ct. 397, the Court commented:

> "We are endeavoring to apply a procedure, set forth by Congress, in accordance with the statutory

> plan and the concepts of basic fairness which underlie all our legislation. We have held that to meet its duty under § 6(j) the Department must furnish the registrant with a fair resume of the FBI report. It is clear in the circumstances of this case that it has failed to do so, and that petitioner has thereby been deprived of an opportunity to answer the charges against him. This is not an incidental infringement of technical rights. Petitioner has been deprived of the fair hearing required by the Act, a fundamental safeguard, and he need not specify the precise manner in which he would have used this right and how such use would have aided his cause in order to complain of the deprivation." [402]

It is clear from the undisputed, factual sitation in this case that the registrant didn't get his notice in time to exercise his right to this Appearance Before Local Board. We will argue that his failure to timely ask for it, under these circumstances should not be construed a waiver. It is factually clear also, that the local board itself partially realized this for it gave him an administrative appellate opportunity. We have already argued (Opening Brief pages 23-) that his appellate opportunity was a crippled one for it didn't have the benefit of a record augmented by a summary of the give and take of a hearing; in addition, of course, there is the possibility he might have persuaded the local board itself of the merit of his claim.

This portion of the regulation is contrary to the spirit of the Act. It should be so condemned. In any event,

the local board should not be excused for its failure to listen to him orally.

The records of this Court show numerous instances of boards giving the registrant an interview out of time.* An "Interview" is the equivalent for all purposes of the Appearance Before Local Board, excepting only one: the registrant is not in as good a technical position to claim there was an actual reopening. But it does give him the chance to look the board members in the eye, etc., etc. Allen Hamilton never once had such a chance.

Some boards seem to have crystallized a fair policy on this problem. This is exemplified in a currently submitted case in the Southern District of California, *U. S. A.* v. *Grizzard*, No. 32555:

May 6, 1963

SSS No. 4-141-38-792

Richard Byrne Grizzard
925 Agate St.
San Diego 9, California

Dear Sir:

Reference is made to your letter dated May 2, 1963 regarding your request for a personal appearance and appeal. This is to advise that the local board is

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*A short search shows: *Gallegos* v. *United States,* 9 Cir., No. 17,330, minutes, 10/10/56, "Request to registrant to report for interview with local board"; *Shaw* v. *United States,* 9 Cir., No. 16,139, minutes May 7, 1957—"Reg. directed to appear before Local Board for an interview on May 23, 1957, at 2:00 p.m.; *Evans* v. *United States,* 9 Cir., 15,385, minutes, 6-1-55, Notice to reg. to report for interview with Local Board on June 14, 1955, at 10:35 a.m.

willing to grant you the opportunity to appear for an interview only to discuss your case, but this appearance will not be considered as a procedural right since a registrant is only granted the procedural right of a Personal Appearance and Appeal within 10 days after his Notice of Classification, (SSS Form 110) has been mailed to him.

Enclosed is a letter which schedules you to report for an interview with the Local Board.

Very truly yours,

FOR THE LOCAL BOARD
Patricia Doane
Clerk

The referred to letter scheduling the interview is a mimeographed form, filled in as shown:

May 6, 1963

SS No. 4-141-38-792

Richard Byrne Grizzard
925 Agate St.
San Diego 9, California

Dear Sir:

You are requested to present yourself for an interview with this local board at the above address on May 16, 1963 (Thursday) at 3:15 p.m. for the purpose
(date) (hour)
of clarifying information in your Selective Service file.

BY DIRECTION OF LOCAL BOARD
No. 141

/s/ Patricia Doane
Clerk - Patricia Doane

Appellee cites three cases to support its following conclusion:—"Since the appellant did not comply with the procedural requirements he cannot now complain that he was denied due process. See *United States* v. *Monroe*, 105 F. Supp. 785 (S.D. Calif. 1957); *Feuer* v. *United States*, 208 F.2d 719 (9th Cir. 1953); *United States* v. *Bonga*, 201 F. Supp. 908 (E.D. Mich. 1962)."

These three cases are distinguishable:

1. *Monroe* was not only in noncompliance with the regulations but was in a completely untenable position; the board had formally declared him a delinquent [§§ 1642-] and, moreover, his effort to have new evidence considered was not only after the board ordered him to report for induction but after the date specified for him to be inducted.

Hamilton was not a delinquent when he asked for the opportunity to meet with the local board, he acted as soon as he came back from his business trip and found the notice.

2. *Feuer* was characterized by this court as a mere "staller" [721]. No one has said or implied this of Hamilton and we doubt that this court will so conclude. Hamilton is a young man with a family problem. None of these three cases had comparable factors involved.

3. *Bonga* was in precisely the same position as Monroe, in that his "claim for exemption [was] first advanced after defendant refused induction." [915]

We believe the factual situations sufficiently distinguish Hamilton's situation from the distinctly unappealing claims and far-out postures of Monroe, Feuer and Bonga.

We believe there are degrees of neglect; that some neglects, as in the case of Allen Hamilton are excusable (and excusable to a greater extent than the board was willing to go) and that other neglects, as in Monroe and Bonga were too far beyond reason and that others like in the case of a staller such as Feuer are not to be excused.

The courts have dealt leniently with a considerable number of excusable neglects. Examination of these cases shows Allen Hamilton's factual situation compares favorably with the records in them.

First, in general, this Court has looked to the spirit of the Act and not always to the precise letter of the regulations:

In *Talcott* v. *Reid*, 9th Cir., 1954, 217 F.2d 360, we see:

> "We have very carefully analyzed the letter in the light of the waiver issue and have concluded that it did not constitute a waiver of a personal hearing before the local board. Inasmuch as a personal hearing is a definite right given every registrant by the Congress, there is no question but that such right should not be construed as having been waived unless the facts leave no other reasonable conclusion open.[1] [362]

In *Cox* v. *Wedemeyer, supra,* this court said:

> "It does not conform with the letter or spirit of the Act or of the regulations, to construe the language

1. *Cox* v. *Wedemeyer,* 9 Cir., 1951, 192 F.2d 920; *United States* v. *Brandt,* D.C. S.D. Iowa, Cr. No. 1-2227, June 2, 1952; *United States* v. *Blaker,* D.C. S.D. Ind., Cr. No. 9677, March 12, 1954.

> of appellant's letter under the same strict rule of interpretation applicable to a formal assignment of errors." [923]

Next, specifically, courts in this jurisdiction have concluded there may be legitimate excuses for neglect and, in such instances, that the local board should give the registrant another opportunity to meet with it:

> In United States v. Waterfield, No. 3143, D.C. S.D. Calif., May 15, 1953, it was held that the local board should have given the registrant another date for the hearing, his mother having advised the board that the registrant was out of town when the invitation came. In United States v. Williams, No. 3207, D.C. S.D. Calif., September 20, 1954, it was held that the registrant's explanation that the mail came late, plus his request for another date, should have resulted in a second invitation to come and talk to the board." [835, 41 Am.BarAssoc. J., Sept., 1955.]

In other jurisdictions similar lenient applications of the law have been made when the factual situation was similar to Allen Hamilton's:

Ex parte Fabiani, D.C. Penna. 1952, 105 F. Supp. 139, is quite close to our set of facts, although much more neglect was shown. Fabiani had failed to report for the pre-induction physical examination and failed to report for induction, as ordered. The question, as here, was: did his excuse warrant lenient consideration by the Court?

Despite the fact the nation was deeply involved in Korea at the time Judge McGranery (later Attorney General) saw that the spirit of the law called for leniency

in interpreting the regulations because of a fact that applies at least as much to our situation: the draft act was not a war act:

> "The different objective to be achieved by the new Act behooves us to employ a more liberal standard of judicial review, so as better to protect the rights of the individual. Should—which God forbid—world tensions increase greatly or should general war come, then the judicial arm can once again cut to the barest minimum its supervision of the operation of the draft." [146-147]

Judge McGranery went on to show that this rule for interpretation was well recognized:

> "We think that the different objective of the 1948 and 1951 Acts has been recognized by numerous Courts, and that they are consequently more willing to scrutinize the actions of the local boards (cf. Horowitz, 'Rights of a Registrant under the Selective Service Law," 7 Intramural Law Review of New York University 106 (January, 1952)). Thus, in Tomlinson v. Hershey, D.C. Ed. Pa. 1949, 95 F. Supp. 72, Judge Ganey of this Court refused to dismiss a complaint for an injunction and a declaratory judgment brought by a registrant against the authorities of Selective Service, even though he had not reported for induction as ordered." [147]

The judge then went on to quote from many cases in similar vein. A mere glance at Judge McGranery's list shows that, as early as 1952 an impressive list of opinions on this point had already been made.

This principle has been applied in other, related areas. One example should suffice. This court, in *Donato* v. *United States,* 9 Cir., 1962, 302 F.2d 468, said that the government had argued that failure by the registrant to exhaust his administrative remedies barred him from consideration and had argued also "that however flexible the rule may be in other circuits this court has refused to regard it as other than inflexible" [469-470].

This Court, nevertheless, went on to conclude that "[u]nder all of the circumstances of this case a relaxation of the exhaustion of remedies rule would be just and proper." [470] Even the dissenting judge agreed, in principle: "I would not contend there are no valid excuses for failure to take an administrative appeal." [470]

POINT II.

Appellee here argues that (1) the local board was not required to reopen the classification and (2) that its action did not constitute a reopening.

To support its first position appellees claim the Order to Report for Induction is a deadline that is an absolute bar to reopening, unless the board first specifically finds there has been a change in the registrant's status resulting from circumstances over which registrant had no control.

We say that a board cannot defeat the intent of the law by failing to act. If, in all fairness the circumstances were such that the registrant had no control over them his change of status is to be recognized and a failure on the part of the board is its own failure, an abuse of authority or of discretion.

Can it be said that the registrant had any control over the physical and mental condition of his mother?

Again, in connection with this point appellees argue that neglect bars complaint by the registrant. Four cases are cited: "See, *United States* v. *Mohammed*, 288 F.2d 236, cert. den. 82 S. Ct. 37, 368 U.S. 820, 7 L. Ed. 2d 26, 82 S. Ct. 238, 368 U.S. 922, 7 L. Ed. 2d 137; *United States* v. *Bartlet*, 200 F.2d 385 (7th Cir., 1952); *Boyd* v. *United States*, 269 F.2d 607 (9th Cir., 1959) and *United States* v. *Bonga*, *supra.*"

We believe these cases should not be applied to our situation:

1. *Mohammed*, the Seventh Circuit declared, made only a "naked claim" and made "no attempt to submit written proof of facts showing his entitlement to the claimed exemption." [243]

This registrant was very negligent, in addition to being weak in his claim for a *minister's* classification the opinion pointing out he had at least nine strikes against him:

> "The selective service agencies were here presented with the file of a registrant who had—
>
> (1) expressly disclaimed ministerial status in his classification questionnaire.
>
> (2) His claim of conscientious objector status had been granted upon file information, inter alia, that he was attending the University of Islam, a private school operated by his sect, in a curriculum which included religious instruction.

(3) He had attended the same school since the age of seven years as the trial judge so aptly pointed out in his memorandum.

(4) He expressed no dissatisfaction with the 1-0 classification given on June 6, 1956, until after the local board had begun processing his file for his induction into civilian work of national importance. He was advised within five days after his 1-0 classification that civilian work was contemplated to be ordered.

(5) He still remained silent for approximately four months until October 9th. He then advised the local board that he could not work for any other organization because he was serving the Temple of Islam 'in any way it finds necessary.'

(6) At the meeting on January 15, 1957, he stated that he was working full time in a restaurant operated by his sect. He did state that he was devoting his spare time to study and teaching of the religion of Islam,[13] but still

(7) did not submit any written evidence of any change in his status, as reflected by the evidence in his file at the time the 1-0 classification was given.

(8) Instead, he waited until he had been indicted for disobedience to an order to report for work. On the eve of his trial on that indictment, his letter of April 1, 1958, asserted to the State Director that the same evidence which had been previously considered by the appeal board showed that he had been a student for the ministry of Islam

since shortly after December 18, 1952, a claim which he then asserted for the first time.

(9) He might yet have submitted proof to substantiate his claim, but did not do so."

* * *

"The board was not arbitrary in its refusal to reopen defendant's classification upon the record in this case." [243]

We believe no argument is needed that the Mohammed decision was based on a very different record from Allen Hamilton's.

2. *Bartelt,* the next case cited, is so different factually that it is not in point. Bartelt *was* given "another personal appearance before the board" *after* the refusal to reopen [See opinion, p. 388]. This is just what Hamilton wanted.

Also, Bartelt's new evidence could not possibly have entitled him to his claimed, ministerial [IV-D] classification because his claim was that of a divinity student and such a claimant must show full time student activity [his evidence was 12 hours a week] as distinguished from a claimant who says he is a regular or an ordained minister, the minister being required only to show that his activity in his vocation, hours being immaterial.

3. *Boyd* is distinguishable in that (1) he had been formally determined delinquent before he sent in his claim and evidence [see p. 608] and (2) the court believed his claim of a changed status was a change over which he had control and therefore barred by the explicit proviso of the regulation. [611] And finally (3) the act of the clerk

giving Boyd the special form for conscientious objectors was merely a ministerial act, one required of her by the regulations. [610]

Hamilton had not been declared delinquent when he presented his new and further evidence; his changed status (his mother's physical and mental illness) could hardly be characterized as one over which he had control; finally, he does not base his reopening claim upon a request for a form that the clerk was required to give upon demand but upon the detailed evidence sent at the explicit, detailed invitation of the board.

4. *Bonga,* as we have shown above, first advanced his claim after the date set for the induction ceremony and was thus unreasonably late.

Appellee next deals with the question whether the board's action constituted a reopening. The two Second Circuit cases we relied on are discussed. To what is said in our Opening Brief we add only the comment that the argument of appellee is based on a difference of opinion among the Second Circuit Judges. The court, as constituted in the Vincelli case contained different personnel, Judge Hand and Clark not being part of the Vincelli panel.

In any event we reinvite attention to the chief argument on reopening we made in our Opening Brief, commencing on page 26: Contrasting with our short argument based on *Packer, supra,* we argued from page 25 to page 35 that Should the court not decide to follow the reasoning and holding of the Second Circuit, in *Packer, supra,* we rely on this point: "The evidence produced by

its registrant required a reopening by the board." We believe our latter argument was not disturbed.

POINT III.

Appellees contend that *Dickinson* v. *United States,* 1953, 74 S. Ct. 152, and the long line of cases following its holding "is limited to situations where a ministerial or conscientious objector deferment is involved, and these cases are not applicable to a dependency or hardship deferment." No rationale or argument is presented by appellees for limiting the unqualified holding of the Supreme Court. After a cataloging of methods available to the board for testing the claims of its registrant the Court concluded:

> "But when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice. Reversed." [74 S. Ct. 152, 158].

In any event, it is our view that the Dickinson doctrine is not limited to religious claims and that no reason has been given for a change. We also believe this view is accepted in this jurisdiction:

One from Hawaii said:

> "In the light of the Supreme Court's decisions and the decision of the United States Court of Appeals for the Ninth Circuit in the case of Schuman v. United States, 208 F.2d 801, even though these are cases involving ministers, *I think the same spirit of decision is applicable here.*" (Italics supplied).
>
> *United States* v. *Izumihara,* 1954, 120 F. Supp. 36, 40.

In *Johnson* v. *United States,* 9 Cir., 1961, 285 F.2d 700, it was held, after a somewhat detailed discussion of Johnson's evidence concerning his activities:

> "Thus no prima facie case of an occupational deferment was established, and Dickinson v. United States, 1953, 346 U.S. 389, 74 S. Ct. 153, 98 L. Ed. 132, is inappropriate." [703]

Appellee next argues that what the registrant presented was not sufficient reason upon which to defer appellant. The only factual matter presented by appellees was that the conservatee's estate was $17,444.77. Appellees ignore the conceded fact [by them] that this total was for a home and some furnishings and $1,944.77 in cash. If the board was using the standard of absolute poverty we question the legality of such a standard. If the board was requiring that the defendant be bedridden, as we are informed and believe some boards have we similarly question this standard, as a matter of law. The standard imposed by the law "extreme hardship" is not a definitive or an absolute. It varies according to circumstances. In the context of the regulations it varies according to military need, international tension and local, economic conditions and the available manpower pool. We submit that Allen Hamilton's mother, by being deprived of his aid is suffering extreme hardship in the context of conditions in the Summer of 1963. By this we mean chiefly the well-known, undisputable fact that only a trifling percentage of our man-power pool was being taken away from pursuit of individual aims and family obligations. As Judge McGranery said in *Fabiani, supra,* conditions change the

attitude of the courts. The concept of extreme hardship being relative it is not now what it was during the war and Allen Hamilton's mother should be in the same situation as other mothers. As it is, she is needlessly (that is, unequally) exposed to hardship and deprivation.

In this connection we should consider again the President's September 10, 1963, Executive Order No. 11119. As we argued in our Opening Brief (pp. 47-) the Executive Order was a finding of fact. It found that current conditions (military needs) did not require hardship on wives by the induction of husbands. The object of the President was accomplished by the device of amending the regulation (§ 1631.7) setting forth the order registrants are to be called from the manpower pool. By the amendment husbands were placed close to the bottom. Since it has been many years since boards have had to go that "low in the barrel" this Order gave such a registrant the equivalent of a III-A classification, a deferment by reason of extreme hardship.

There can be no other interpretation of this Executive Order. The act is clear:

> "The President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment * * *.
>
> [24 lines omitted]
>
> "The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces or from training in the National Security Training Corps (1) of any or all categories of persons in a

status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable, and (2) of any or all categories of those persons found to be physically, mentally, or morally deficient or defective."

The Act clearly forbids an explicit deferment for a registrant merely because he is married. This also is the interpretation of Hon. Carl Vinson, Chairman of the Committee on Armed Services, House of Representatives. On March 1, 1963, he stated to his committee:

"Now, I would like to briefly describe the operation of the draft law.

"I do that because we have had many new members of the committee since the law was extended 4 years ago. These are the high points of the draft law.

* * *

"The law also permits the President to provide for deferments because of an individual's occupation or because of his dependency status. However, an individual may not be deferred under the law on the basis of marriage alone, except in cases of extreme hardship."

It is therefore evident that the President only gave us a clarification of the expression, "extreme hardship." [No. 3 Full committee consideration of H.R. 2438, to extend the induction provisions of the universal military training and service act, and for other purposes.]

We submit that the President was merely giving expression to what was common knowledge, namely, the

Selective Service System had a manpower pool vastly exceeding its needs and this long-standing condition had to be officially recognized.

To support its argument on hardship appellee cites only *Micheli* v. *Paullin*, 45 F. Supp. 687 (D.C. N.J. 1942). That court expressly found that Micheli's parents "could sustain themselves in some manner for the duration of the war." [691]

What evidence is there of Allen Hamilton's mother's ability to sustain herself for the two years of his draft service and to rebut the *prima facie* showing made by the registrant? Only two possibilities are present, for she was clearly unemployable:

(1) That she had a new husband. On January 19, 1963, the registrant, under penalty of perjury, wrote the local board: "Albert Harris is unable to support my mother—he has no job." [86] No effort was made by the board to refute or minimize this statement. The family lawyer, Paul K. Robertson, on January 11, 1963, wrote the board a long letter concluding—

> "At present Mrs. Hamilton has remarried to a man who, from all appearances, has no intention of supporting her or caring for her in this time of need. Should Mr. Hamilton be inducted the family would be presented with quite serious problems. Mrs. Hamilton's newly acquired husband would be the obvious choice as her guardian and conservator. Needless to say, neither Mr. Hamilton nor I place much faith in this gentleman's ability to preserve the estate.

> "As a matter of fact, with Mr. Hamilton unable to perform his duties as conservator I think it highly probable that in a short time Mrs. Hamilton might be on the welfare rolls." [70]

There is nothing in the file to cast doubt on this. On April 18, 1963, a letter from her medical doctor was filed showing the mother is unemployable and "deteriorated." [Ex. 129]

(2) That she had, in addition to her $15,500.00 home and furnishings, about $2,000.00 in cash, at the time of the inventory. How long could such a sum last to support herself, her jobless husband and pay her taxes? The military allotment, shared with his other dependent [wife] is an inadequate pittance.

POINT IV.

This section of appellee's brief was entitled: Are the respondents the proper parties to this action?

There is no material disagreement in this area.

Respectfully,

J. B. Tietz,
Attorney for Appellant.

November 4, 1963.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. Tietz,
Attorney.